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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 834

JOHN G. GILES AND JAMES V. GILES, *Appellants*,

v.

STATE OF MARYLAND

On Appeal from the Court of Appeals of Maryland

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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The issue now before this Court is whether the federal questions raised in this case are substantial. Appellants submit that the elaborate defense of the jury as judge rule contained in appellee's Motion to Dismiss or Affirm indicates clearly that the questions are substantial.

I. The Jury as Judge of the Law

A.

Appellee has incorrectly characterized appellants' position. Appellants do not suggest that the administration of state criminal law must be uniform. They argue only that the trial provided to defendants with life and liberty at stake must not be fundamentally unfair. Appellants have indicated in their Jurisdictional Statement the extent to which the provision giving juries the right to judge the law is unfair. They indicated in addition that numerous state courts have recognized this fundamental unfairness.[1]

In response, appellee does not seriously argue that the Maryland rule is fair. The bulk of appellee's argument is that its rule is not as unfair as it used to be. That may well be, but all the aspects of unfairness discussed by appellants are present in the system as it now exists, and as it affected appellants' trial.

Appellee also presents two subsidiary arguments. First it says that appeals in Maryland are easier now than in the old days.[2] Thus, an easier appeal is said to make a fair trial unnecessary. To state the proposition is to answer it.

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[1] See cases cited in Jurisdictional Statement, pp. 11-14. Those cases are not, as appellee suggests, based merely on recognition that the jury as judge rule was not part of the common law of England. They set forth many reasons why the rule is basically unfair.

[2] Motion to Dismiss or Affirm, pp. 15-16. Even these rules appear now to be constitutionally defective. Compare Maryland Rule 719, requiring appointment of counsel only in cases where the penalty may be five years or more in prison, with *Gideon* v. *Wainwright*, ... U.S. ...., October Term, 1962, No. 155, decided March 18, 1963.

Second, appellee suggests that appellants need not have had this unfair trial, for they could have waived jury trial altogether, and been tried by the court.[3] Putting to one side the obviously disquieting nature of this suggestion, it must be observed that it is essentially an argument that appellants waived[4] their right to a fair trial in this respect. As such, the argument should have been addressed to the court below. It was not so addressed, however, and that court squarely considered and passed on the fairness of the trial received by appellants.

Appellee devotes much space to the ancient lineage of its system. Appellants have already pointed out[5] that age is no guarantee of constitutional validity, and this Court has recently reaffirmed this important principle. *Gideon* v. *Wainwright, supra.*[6]

Appellee cites cases from eight jurisdictions to show that the jury as judge rule once prevailed in numerous jurisdictions.[7] This brief is not the place for detailed

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[3] Motion to Dismiss or Affirm, p. 22. This argument is of course based on the premise that the Fourteenth Amendment does not guarantee state jury trials in criminal cases. See *Maxwell* v. *Dow*, 176 U.S. 581 (1900). But cf. *Adamson* v. *California*, 332 U.S. 46, 68-125 (1947) (dissenting opinions), and concurring opinion of Mr. Justice Douglas in *Gideon* v. *Wainwright, supra.*

[4] Appellee's fondness for waiver reasoning (see Point II, *infra*) in this case is understandable, in view of its lack of answers on the merits. This is, however, a capital case, and fundamental fairness of the trial is not a requirement to be taken lightly.

[5] Jurisdictional Statement, p. 16.

[6] Cf. *People* v. *Bruner*, 343 Ill. 146, 162, 175 N.E. 400, 406 (1931), where the Illinois Supreme Court, in rejecting the jury as judge rule, stated that the "fact that the statute in question has been construed and applied during a considerable period of time does not necessarily render it immune from constitutional attack."

[7] Motion to Dismiss or Affirm, pp. 11-12.

discussion of these cases. Appellants do not contend that the rule never prevailed. They contend that it is fundamentally unfair, and this was ultimately recognized in seven of the eight jurisdictions mentioned by appellee. (Indiana is the exception.)[8]

B.

On the merits of its jury as judge rule, appellee ventures only to suggest that juries operating under the normal system have the *power* to ignore the binding instructions they are given, so the Maryland system is no worse.[9] Appellee suggests special verdicts as the only remedy.

Preservation of the general verdict in criminal cases is indeed essential, but measures to do so need not go to the extreme of encouraging jury lawlessness. Appellants can only point out that the general verdict in criminal cases has been adequately safeguarded in all other jurisdictions, where binding instructions are given. The crucial difference between the systems is that binding instructions provide a reasonable basis for presuming that a jury acts lawfully, whereas advisory instructions (or a complete lack of any instructions) provides basis only for the presumption of jury

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[8] It is not clear whether the rule actually did prevail in all of these jurisdictions. Cf. *State* v. *Gannon*, 75 Conn. 206, 231-232, 52 A. 727, 737 (1902); *State* v. *Ballerio*, 11 La. Ann. 81 (1856); *Harris* v. *State*, 7 Lea 538, 544 (1881); *Brown* v. *State*, 40 Ga. 689 (1870); *Commonwealth* v. *McManus*, 143 Pa. 64, 85, 21 A. 1018, 1019-1020, 22 A. 761 (1891). See also *Pennsylvania* v. *Bell*, Addison 156, 160-161 (1793), where Alexander Addison, one of the staunchest supporters of the rights of juries in the Pennsylvania constitutional convention of 1790, 22 A., at 764, powerfully stated the dangers of the jury as judge rule.

[9] Motion to Dismiss or Affirm, p. 21.

caprice. Indeed, that is the very premise of the Maryland system.[10] If juries are not to disregard instructions on occasion, the system is without meaning.

II. The Lack of Instructions

Appellee contends that the Court of Appeals of Maryland did not pass upon the merits of appellants' lack of instructions point on the ground the point had been waived by failing to request instructions or to object to the failure to give any instructions. Appellee's argument proceeds upon an inaccurate view of appellants' point. The Maryland court, in the opening sentence of part (vi) of its opinion, states the point accurately:

> There is also a contention that the defendants were denied due process and equal protection of the law by the failure of the trial court to give an advisory instruction as to the law even though the defendants made no request therefor. *This contention, like that in Point (v), also lacks merit.*[11]

Appellee, by stating appellants' point to be that it was a denial of due process "for the judge not to give the jury any advisory instructions,"[12] is able plausibly to read the Maryland court's opinion as failing to decide

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[10] Appellee quotes the observation that juries with the right to judge the law "should, and usually do, respect the opinions and advice of judges, on questions of law, and would seldom be found to put themselves in opposition to the decisions of the supreme judicial tribunal of the state." Who knows, and how? How can the jury give such praiseworthy obeisance to those decisions when, as in this case, the trial judge gives no instructions at all?

[11] Jurisdictional Statement, Appendix, p. 14a (Emphasis supplied).

[12] Motion to Dismiss or Affirm, p. 23.

the question upon the merits. The short refutation of appellee's reading is of course the court's statement, italicized above, that appellants' point "lacks merit," which can hardly mean that the court is refusing to decide whether the point has merit. Furthermore, when the point is correctly stated, as by the court, it is plain that the court's subsequent references to waiver are in fact a response to the merits of the point. Thus, appellants argued that there is a constitutional duty on the part of the trial judge, *regardless of requests or objections*, to advise the jury of the basic applicable law; the court held that there is no such duty. In the court's view, there is a right to instructions upon request (perhaps even a constitutional right); that right, however, is waived by any failure to request or object. Thus, the court obviously held that appellants' point "lacks merit" because the trial judge is bound to give instructions only upon request, not otherwise. That holding squarely disposes of the lack of instructions point upon the merits. To be sure, the court does discuss waiver as a method of stating the limitations, in its view, of the right to instructions. Such a use of the term should not, in the face of the clear holding on the merits, be confused with a refusal, upon an adequate, independent state ground, to reach the point tendered by appellants.

Moreover, even if appellee were correct in arguing here that the Maryland court did not intend to reject appellants' point upon its merits, such a result could only have flowed from a failure of the court to decide the issue actually tendered, which was necessary to a disposition of the appeal. Logically, it is no answer to the argument that a judge must instruct regardless of request to say that absent a request the question of whether a judge must instruct cannot be decided. Such

a response either misunderstands the issue, or is simply a manner of stating that a judge need not instruct absent requests. The Maryland court's opinion, read as a whole, appellants submit, shows that the latter was the position of the court. In any event, any failure of that court to decide the lack of instructions issue on the grounds appellee suggests, would be a failure to pass upon the issue actually presented and necessarily decided to dispose of the case; the issue therefore is properly before this Court. *Dorchy* v. *Kansas*, 272 U.S. 306, 308-309 (1926); *Ward* v. *Love County*, 253 U.S. 17, 22 (1920); *Dewey* v. *City of Des Moines*, 173 U.S. 193, 199-200 (1899); *Roby* v. *Colehour*, 146 U.S. 153, 159-160 (1892).

Nor is the asserted "waiver" in this case an independent state ground for the disposition of the lack of instructions issue. The "jury as judge" issue, a federal question, is certainly before this Court without any asserted state ground of decision as a bar to its consideration. As shown in the Jurisdictional Statement, pp. 25-29, the factor distinguishing Maryland and other jurisdictions, which would have reversed appellants' convictions because of the total lack of instructions, is just the operation of the jury as judge rule in Maryland. There can be no question but that the "waiver" disposition of the instructions issue by the Maryland court, if such it was, assumes the disposition of the jury as judge issue adversely to appellants. Thus, the asserted state ground barring consideration of the instructions issue is not independent of the federal question passed upon by that Court, but is in fact dependent upon the resolution of the federal question made below. Consequently, there is no reason why this Court should not consider the lack of instructions point along with the jury as judge point.

Cf. *Fiske* v. *Kansas*, 274 U.S. 380, 385-386 (1927); *Giles* v. *Teasley*, 193 U.S. 146, 160 (1904). See also *Fay* v. *Noia*, U.S. , October Term, 1962, No. 84, decided March 18, 1963 (dissenting opinion of Harlan, J., pp. 18-19).

CONCLUSION

Attempts to rationalize the jury as judge system end in chaos. To say that the jury have the right to decide the law as they understand it, but a duty to follow the law, is to utter formalisms which have nothing to do with the reality of a criminal trial, especially where life itself is at stake.

In actuality, Maryland has done no more than to provide an *ad hoc* legislature in the form of a jury.[13] An analysis of the evidence in this case[14] so barren of support for convictions of rape, cannot but indicate that the jury here in fact exercised their right to legislate to the substantial detriment of appellants. Appellants' trial under a system which produced no reasonable assurance that their convictions were had under the law of the land deprived them of their constitutional rights.

Respectfully submitted,

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[13] It must be noted that the Maryland Court of Appeals has been unwilling to permit one of these *ad hoc* legislatures to exercise its right *in favor of* a criminal defendant. *State* v. *Brady*, 226 Md. 422, 174 A. 2d 167, *cert. granted*, 371 U.S. 812, argued March 18 and 19, 1963.

[14] Appellants object, of course, to the distorted and inflammatory presentation of the facts contained in appellee's motion. Further discussion of the facts serves no purpose here.